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Legislative Bulletin……………………………………..………December 22, 2010

Contents:

Conservative Concerns

--**Cost:** This bill creates yet another mandatory spending program that would increase direct spending by $4.29 billion dollars over ten years.

--**Another New Health Entitlement Program:** This bill creates an expensive new entitlement program at a time when the national deficit is $13 trillion. Unlike past block grants and discretionary programs that force Congress to prioritize spending decisions and cut or eliminate old or unneeded programs, this bill, like previous attempts at compensation programs, will likely go over budget while increasing the size of the federal government.

--**Ripe for fraud and abuse:** CBO has stated that "The existence of a causal relationship between the attacks and specific diseases generally would be difficult to establish or disprove." The program will need to establish stricter medical criteria, permit independent medical review, among other items to ensure that taxpayers' money is spent efficiently on those who truly need care.

--**Permanent Federal Expansion:** In addition to being an entitlement program, some have argued that this could act as a template for future federal responses to disasters - which historically has been a state issue.

--**Access for Illegal Immigrants and Millionaires:** The eligibility criteria laid out in the bill is silent on providing identification to prove U.S. citizenship and does not require means testing. In a program that is capped, it is troubling that individuals residing in the U.S. illegally could keep American responders or survivors from accessing care.

--**Raises Taxes, Extends Protectionist Policy and Limits Free Trade and Legal Immigration:** In order to pay for this new entitlement program, the Democrats have increased taxes on businesses and individuals raising several World Trade Organization (WTO) agreement concerns. The bill includes a 2% tax on businesses, mainly in the Middle East, that provide goods or services for government procurement which are often local services providers to U.S. troops, thus limiting the purchasing power for our government and the military and extends taxes on H-1B and L-1 visas, which have raised concerns that this disproportionally affects India-based firms and limits legal immigration. See below for more details.

--**Process:** Instead of going through an open and transparent process, allowing for amendments and debate, the Democrat Majority has placed a $4.29 billion bill on the suspension calendar with less than a day to look at the final bill text.

Senate Amendment to H.R. 847— James Zadroga 9/11 Health and Compensation Act (*Rep. Maloney, D-NY*)

Order of Business: The Senate Amendment to H.R. 847 is scheduled to be considered on Wednesday, December 22, 2010. On July 29, 2010, the House previously voted down H.R. 847, under suspension of the rules, by a vote of 255-159, but later passed it under a closed rule on September 29, 2010, by a vote of 268-160. The Senate, in a last minute "deal," passed an amendment in the nature of a substitute by unanimous consent on December 22, 2010. The "deal" made significant changes summarized below.

Major Changes Since the Last Time This Legislation Was Before the House: The Senate Amendment makes the following *major* changes from the previous language:

- **Offset**: Changes the offsets by removing the limitation on treaty benefits for foreign corporations doing business in the U.S. and a corporate estimated tax timing gimmick. The bill replaces it with an excise tax on certain foreign procurements and extending fees on certain visas. The new language removes a provision included in the original Senate Amendment which would have extended fees on tourists who use the electronic travel authorization system. *According to CBO estimates this would increase taxes by $4.729 billion dollars.*
- **Cost**: The bill changes the cap on the total payments awarded through the VCF to $2.775 billion (down from $8.2 billion) from FY2011-2016. CBO estimates that the new "deal" would increase direct spending $4.29 billion over ten years (as opposed to $10.4 billion). The WTC Health Program would be subject to annual spending caps totaling about $1.5 billion through 2020 (when the program would sunset). Unlike the previous versions, the proposal removes the allocation and maintenance of $4.2 billion in funding for the Victims Compensation Fund (VCF) outside this ten-year window.
- **Victims Compensation Fund (VCF):** The new language would close the VCF in 2016, as opposed to 2031 under the original bill. This change alleviates some of the concerns that the VCF was extremely susceptible to waste, fraud and abuse as well as significant long-term costs. According to news reports (subscription required), the reduction in VCF funds in the bill come after "a settlement with New York City that would pay first-responders, among others, more than $600 million to cover the cost of respiratory problems and other potential long-term health effects from the toxic dust created by the terrorist attack."
- **Attorney Fees**: The new bill places a hard cap for attorneys' fees at 10% of the total award and allows the Special Master to reduce attorneys' fees if he finds that they are excessive.
- **Removes the Authority to Reinstate Certain Lawsuits / Civil Claims:** The language removes the provision that would allow claimants who were previously rejected from the VCF to pursuing a civil lawsuit. This is consistent with the earlier VCF policy.

- **Limitation on Infrastructure Costs:** The new language states that "fixed infrastructure costs" of the Centers for Excellence do not include "costs for new construction and other capital costs" thus limiting how funding can be spent.
- **Commitment to ensure eligible individuals cannot "double-dip" on benefits:** According to Senator Coburn's summary, "the Senators all agreed to get in writing from the Special Master that he will include workers compensation benefits in collateral sources of benefits that he must offset from potential compensation awards."
- **GAO Reports for More Accountability**: The bill adds language that would require additional GAO reports to determine less expensive ways to provide nationwide care, pharmaceutical access, and health information technology as well as "claims-level data reporting to provide accountability and opportunity for oversight."

Summary: H.R. 847 would create a new health entitlement, the World Trade Center (WTC) Health Program for eligible residents and first responders, while extending and expanding eligibility for compensation under the September 11th Victim Compensation Fund (VCF) of 2001. CBO previously predicted that 650,000 individuals from the NYC disaster area and 10,000 responders from the Pentagon and Shanksville, PA, will qualify for the new program. However, CBO believes that only 15% would enroll in the WTC Health Programs and over 5% would receive rewards from the VCF. In order to off-set the new spending, the bill raises taxes through an excise tax on certain foreign procurements and extending fees on H1B Visas and on electronic travel authorization system.

Title I – HEALTH CARE BENEFITS

Title I would establish the new mandatory World Trade Center (WTC) Health Program within HHS to replace and vastly expand the discretionary programs that currently exist under the National Institute of Occupational Safety and Health (NIOSH). NIOSH will still be responsible for monitoring, while the Secretary of HHS has the discretion to determine what agency will deal with reimbursement.

Background: Beginning in FY 2003, Congress began appropriating funds for the WTC Medical Monitoring and Treatment Program for medical monitoring of first responders. In FY 2006 the program was expanded to include funding for treatment, as well as monitoring at Centers of Excellence in the New York / New Jersey metropolitan area. Previously such treatment was funded by the Fire Department of New York and the American Red Cross. In 2006 New York City established the WTC Environmental Health Center at Bellevue Hospital (which later expanded to additional locations) to provide treatment to all individuals with WTC-related health problems. Finally, in 2008, the Centers for Disease Control (CDC) awarded the New York City Health and Hospitals Corporation (HHC), which oversees the program, a $30 million grant over three years to provide treatment and other services for those directly affected by the attacks. Beginning in FY 2002, Congress appropriated money for WTC-related needs, culminating in the President's FY2011 Budget request for $150.1 million for the community (a $69.4 million increase from the FY2010). Energy and Commerce Committee Staff have estimated that over $1 billion in federal funds has already been spent on 9/11 WTC health-related programs.

Funding: The WTC Health Program would be subject to annual federal spending caps totaling about $1.5 billion through 2020. However, CBO has predicted that the cap will be reached by 2019. As amended, in order for the program to be implemented, New York must enter into a contract to pay 10% of the program's cost through 2015 and 1/9 (11.12%) of the Federal expenditures for 2016. The federal government would then pay the lesser of 90% or the annual cap. Essentially, any unspent federal funds for the first 8 years may be used to supplement the last two years, subject to the total cap. The bill establishes the WTC Health Program Fund, capitalized by the State of New York and the federal government, and used to pay benefits.

Additionally, CBO previously estimated that the total cost for the following additional funding items will be $0.7 billion for FY 2011-2020:

- A new WTC Health Program Scientific/Technical Advisory Committee to review and make recommendations to the Administrator on additional eligibility criteria and health conditions.
- Education and outreach programs.
- Uniform data collection, analysis and reporting of data on the monitoring and treatment benefits, prevalence of existing WTC-related health conditions, and identification of new WTC-related health conditions.
- Training and technical assistance, transportation and claims processing.

WTC Program Administrator: Administration of the Program is divided into two categories, activities overseen by an official in the Department designated by the Secretary of HHS and activities overseen by the Director of NIOSH or his designee. Some conservatives may be concerned that this bifurcated system of oversight and regulation will lead to confusion and yet another bureaucratic nightmare for victims of 9/11. Activities overseen by the HHS official include:

- Payment for initial evaluations, monitoring and treatment. This includes running the competitive bidding program for providing pharmaceutical benefits.
- Determination of eligibility and enrollment.
- Administering secondary payor provisions.

All other WTC Program activities and operations will be administered by the Director of NIOSH or his designee including:

- Selection of Clinical Centers of Excellence and Data Centers, as well as medical providers to participate based on their experience treating or diagnosing WTC-related conditions.
- Development of a research program on conditions, and diagnoses.
- Oversight and maintenance of the World Trade Center Health Registry of victims.

Clinical Center of Excellence and Data Centers: The Administrator must enter into contracts with Clinical Centers of Excellence who must, among other items, provide initial health evaluation, monitoring, and treatment benefits, as well as outreach activities, counseling, translational and interpretive services (for individuals who are not proficient in English), and collection of data to report to Data Centers.

World Trade Center Health Program: CBO previously estimated that about 50,000 responders and 230,000 survivors would develop at least one qualifying condition. The WTC program would be divided into three groups:

- **Responder Program**: The Responder Program would provide benefits for firefighters, emergency personnel, law enforcement officers, rescue, recovery, and clean up workers and immediate family members of emergency personnel or firefighters who were killed related to the 9/11 attacks. Responders must meet the geographic-eligibility criteria (defined as New York City, the Pentagon, and Shanksville, Pennsylvania) and time specifications to be eligible to enroll in the WTC Health Program.
- **"Survivor" Program:** The Survivor Program would provide benefits to certain residents and other individuals with qualifying conditions that were working, visiting or residing in the area of New York City near the World Trade Center site during the time specifications following the attacks. Survivors must meet both the geographic-eligibility and develop a qualifying condition (after an initial evaluation) in order to be eligible to enroll in the WTC Health Program.
- **National Program:** The National Program would provide responders and survivors who are eligible for either program but do not live in or near New York City. The WTC Program Administrator would be responsible for creating a nationwide network of providers.

Eligibility Criteria: Eligible individuals for the programs must meet the definitions of a "survivor" and responder, as well as meet other criteria.

- Title I defines the NYC disaster area as the part of Manhattan that is south of Houston Street and any block in Brooklyn that is wholly or partially contained within a 1.5-mile radius of the former World Trade Center site.
- The terrorist attack had to be substantially likely to be a significant factor in aggravating causing or contributing to the illness prior to receiving treatment from the WTC Health Program.
- The bill limits eligibility to 25,000 Responders and 25,000 Survivors, plus those eligible on the day of enactment.
- The bill does not means-test or verify citizenship. It should be noted that Rep. Burgess offered an amendment in the Energy and Commerce Committee to ensure that millionaires did not receive taxpayer-funded health care that failed 22-21.

Benefits: Initial health evaluations (in order to establish eligibility) for survivors and monitoring and medically necessary follow-up treatment for survivors and responders would be covered only when provided by Centers of Excellence or by providers who participate in the network developed by the WTC Administrator. The program would pay for qualified costs that are not covered by an individual's primary insurer.

- Individuals would have cost-sharing requirements, and participating providers (physicians and hospitals) would be paid at 140% of Medicare rates. Some conservatives may be concerned that this increased payment rate for New York providers (compared to the drastic cuts enacted as part of health reform) will produce a financial incentive to order more tests.
- A covered WTC-Related Health Condition must result from the attacks, based on an examination by a medical professional, and be included in the list of WTC-related conditions. However, if a physician determines an individual's condition - not on the list - was caused or worsened by the exposure, then the condition would be deemed related and covered.
- WTC-related conditions include certain aerodigestive disorders, mental health conditions, musculoskeletal disorders (for certain WTC responders), and cancer (with review and

regulation). Mental health benefits are provided for surviving family members of responders who died on site.

- The bill provides for a process to allow the Administrator to add additional health conditions, as well as an appeals process.

Payment of Claims: The WTC program would be the primary insurer for individuals covered under Medicare, but the secondary payer for individuals covered under Medicaid or private insurance, or first responders receiving benefits from a non-NYC worker's compensation plan. Claimants must have "minimum essential coverage," as defined by the Patient Protection and Affordable Care Act (PPACA) beginning in 2014 in order to be eligible for the program.

Title II – COMPENSATION PAYMENTS

Title II would reopen and broaden eligibility for the September 11, 2001 Victim Compensation Fund (VCF) which was created by the *Air Transportation Safety and System Stabilization Act* (P.L. 107-42) and terminated in 2004. The VCF was responsible for providing compensation to any individual (or relative of a deceased individual) who was physically injured (and received treatment) or killed due to the attacks. CBO previously estimated that there are 100,000 responders and survivors that meet these criteria.

The VCF Special Master, established under P.L. 107-42 and appointed by the U.S. Attorney General, will be in charge of administering and defining the geographic area and determining what physical conditions are eligible for an award (in addition to specific physical and mental health conditions laid out in the language).

Funding: Total payments awarded through the VCF would be capped at $2.775 billion from FY2011-2016, of which only $875 million would be available during through June of 2016 (with $1.9 billion available in July of 2016). The Special Master must examine the total number of claims paid over the first year and pro-rate the remaining claims (with protections to previous claimants "to the extent possible") if projections would exceed spending caps. CBO previously estimated (when the VCF was not capped) that $4.6 billion in claims would be paid out over the first 10 years, and as such awards will likely have to be cut back for some claimants.

Changes in Eligibility: H.R. 847 would make several changes to eligibility including:

- Expands the <u>duration of the time</u> present on the site from 12 hours immediately following the attacks for individuals and 96 hours after the attacks for responders, to sometime beginning on September 11, 2001 and ending on August 30, 2002.
- Expands the <u>geographical location</u> from specific streets very close to the site to routes related to debris removal (including landfills and barges) with the ability for the Special Master to expand the area.
- Extends the <u>filing deadline</u> to two years after the regulations are promulgated for individuals that were aware (or should have been) of the injury at the time of the regulations being promulgated and for all others (after the regulations are finalized) two years after realization of an injury.

Awards: The bill requires all claimants to prove that they were treated by medical professionals and provide medical records to verify treatment. CBO previously predicted that nearly 100,000 individuals would meet this qualification. However, based on the VCF's prior approval rate and propensity for individuals to seek legal remedy, CBO has previously estimated that about 35,000 awards - averaging $180,000 each- will be made over the next ten years. The awards will be based off of economic and noneconomic losses. While the average for death awards would be much larger, CBO estimates that the number of overall death awards would be much smaller. H.R. 847 allows individuals who have already settled suits to submit claims under the bill only if the action was commenced after December 22, 2003 (when the VCF was closed) and a "release of all claims in such action was tendered prior to" the date of enactment of H.R. 847. However, in order to prevent "double dipping" by claimants, any VCF awards must be reduced by amounts previously awarded during this time.

Attorney's Fees: The Special Master is given the discretion to award attorneys compensation for services rendered on cases filed in district courts. Attorney's fees are capped at 10% of the award with the ability of the Special Master to reduce fees if they are found to be "excessive." The previous version had two exceptions. The first exception relates to suits that have been settled while the VCF was closed. The bill states that no fee may be charged if such an individual previously was charged a fee in connection with the settlement of such action. However, if the fee charged was less than 10%, a representative (lawyer) may charge a fee for services provided in connection with claims filed under this title, so long as the amount charged is not more than 10% minus the total legal fees previously charged for such settlement.

The second exception is for lawsuits filed "in the Southern District of New York prior to January 1, 2009, in the event that the representative (lawyer) believes in good faith" that the fee limit will not provide adequate compensation for services rendered.

Limitations on Liability: The bill limits the liability of New York City, any entity with a property interest in the WTC on September 11, 2001 and any contractors or subcontractors from damages sought by individuals related to debris removal from sites of the terrorist attacks.

Title III – Revenue Related Provisions

Excise Tax on Certain Foreign Procurements: The legislation would place a 2% tax on businesses (whether foreign or American) that manufacture or provide services on countries that are not party to the WTO Government Procurement Agreements (GPA) - a reciprocal international agreement that ensures U.S. companies can bid on contracts in those countries. This provision mainly affects companies in the Middle East (Iraq and Afghanistan) that provide goods or services for government procurement which are often local services providers to U.S. troops, thus limiting the purchasing power for our government and the military. Although the bill places a prohibition on the reimbursement of fees in order to offset the tax, the likely outcome will be increased prices. Some conservatives have raised concerns that unlike Buy America, there are no exceptions, there is risk of reciprocation, and that such protectionist policies may be in violation of WTO standards, specifically, the U.S.'s obligations covering internal taxation for imported goods. *CBO estimates that this provision would increase taxes by $4.585 billion over ten years.*

Visa Fees: The bill extends fees on certain visas enacted in H.R. 6080, the Emergency Border Security Supplemental Appropriations Act (P.L. 111-230) by 1 year, from September 30, 2014 to September 30, 2015. The provision enacted in H.R. 6080 increases the filing fee, fraud prevention, and detection fee required to be submitted with an application for L-1B dependent employers by $2,250 and by $2,000 for H-1B dependent employers seeking temporary workers. This increase applies to applicants that employ 50 or more employees that have more than 50 percent of their U.S. based employees using H-1B and L-1B visas. The bill designates the fees collected to the general treasury.

- ***H-1B Visas:*** This temporary nonimmigrant work visa for specialty occupations, which require the skills of a professional. It is issued for up to three years but may be extended for a maximum of six. Petitions for H-1B visas are submitted by employers based on their stated need for the non-U.S.-resident employee. The employee must have a minimum of a Bachelor's degree, however in certain cases, experience can substitute for education. There are 65,000 H-1B visas issued every year.
- **L-1 Intracompany Transfer Work Visa:** These visas are available to individuals who are employed outside the U.S. as executives, managers or in a position that requires specialized knowledge. The main requirement for this visa is that the individual be employed outside of the U.S. and is being transferred to a branch, subsidiary, affiliate, or joint venture partner that is located within the U.S. Currently, there are no quota restrictions for L-1 work visas. Spouses and children of L-1 visa holders are allowed to come to the U.S. and may be issued an L-2 visa.

A Senate summary listed four companies directly affected by the change: Wipro, Tata, Infosys and Satyam (all India-based firms). According to news reports, the government of India has expressed concern with the new tax on visas established under H.R. 6080 and "in a letter to U.S. Trade Representative Ron Kirk, India's Commerce Minister Anand Sharma said the bill unfairly targets Indian companies and estimated it would cost the country's firms an extra $200 million a year." Extending these controversial fees could further weaken the U.S.'s relationship with India and raises potential WTO agreement concerns. Some conservatives have also expressed concerns that such fees may result in fewer applications, reducing both the revenue and beneficial economic activity.

Committee Action: H.R. 847 was introduced on February 4, 2009, and referred to the House Committee on Energy and Commerce and the Committee on Judiciary. On March 16, 2010 the Committee on Judiciary reported the bill favorably by a vote of 25-8, with 3 Republicans voting in favor. On May 25, 2010, the Committee on Energy and Commerce reported the bill favorably by a vote of 33-12, with 2 Republicans voting in favor. On July 28, 2010, the day before the bill was scheduled to be on the floor, an amendment in the nature of a substitute was introduced. On July 29, 2010, the House previously voted down H.R. 847, under suspension of the rules, by a vote of 255-159, but later passed it under a closed rule on September 29, 2010, by a vote of 268-160. Finally, on December 22, 2010, the Senate, in a last minute "deal" passed an amendment in the nature of a substitute, by unanimous consent.

<u>Administration Position</u>: On December 8, 2010, the Administration released a Statement of Administrative Policy (SAP) in support of Senate passage of H.R. 847 (as originally passed by the House). However, it should be noted that the Administration has yet to come out with a SAP for the Senate Amendment to H.R. 847 with the new pay-fors.

<u>Cost to Taxpayers</u>: CBO estimate for the new "deal" would increase direct spending $4.29 billion over ten years. The WTC Health Program would be subject to annual spending caps totaling about $1.5 billion through 2020 (when the program would sunset). VCF payment awards would be subject to a lifetime spending cap of $2.775 billion through 2016 (when the program would cease operation). Unlike the previous versions, the proposal removes the allocation and maintenance of $4.2 billion in funding for the Victims Compensation Fund (VCF) outside this ten-year window.

<u>Does the Bill Expand the Size and Scope of the Federal Government?</u>: Yes. According to a CBO, the bill provides over $4.2 billion in mandatory spending over 10 years for the creation of a new health care entitlement program and compensation fund. According to a summary by Senator Coburn, "of that amount, $1.5 billion will go to health benefits, while $2.7 billion will go to compensation."

<u>Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?</u>: H.R. 847 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). However, the bill would impose a private-sector mandate by limiting the liability of New York City and other private entities from damages sought by individuals related to debris removal from sites of the terrorist attacks. CBO previously stated that "CBO cannot determine whether the aggregate cost of complying with that mandate would exceed the threshold established by UMRA for private-sector mandates in 2011 ($141 million in 2010, adjusted annually for inflation)."

<u>Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits?</u>: According to committee report 111-560, H.R. 847 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI of the Rules of the House of Representatives.

<u>Constitutional Authority</u>: In Committee Report 111-560, pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the constitutional authority for H.R. 847 is provided in Article I, Section 8, Clauses 1 (general welfare), 3 (regulate interstate commerce), and 18 (necessary and proper for executing foregoing powers) of the Constitution of the United States.

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